

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2021010408

DECISION

This matter was heard by Marlo Nisperos, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH) by videoconference on March 25, 2021. Claimant was represented by Parent. Westside Regional Center (Service Agency or WRC) was represented by its Fair Hearing Manager, Candace Hein.

Oral and documentary evidence was received, and argument was heard. The record closed and the matter was submitted for decision on March 25, 2021.

ISSUE

Is Claimant eligible to receive services from WRC based on the qualifying condition of Autism Spectrum Disorder?

EVIDENCE

Documentary: Service Agency exhibits 1-4, 6-9; Claimant exhibits A, B1-B4.

Testimonial: Service Agency - Kaely Shilakes, Ph.D.; Claimant - Parent and uncle.

FACTUAL FINDINGS

1. Claimant is an eight-year-old boy who lives in the family home with his parents and three siblings.

2. On January 4, 2021, WRC sent a Notice of Proposed Action (NOPA) and denial letter to Claimant's parents informing them that WRC had determined Claimant is not eligible for regional center services. Claimant requested a fair hearing.

3 A. This matter arose when Claimant's Parent contacted WRC to request an evaluation for eligibility based on Autism Spectrum Disorder (ASD), a developmental disability for which Claimant had been diagnosed in December 2019. On February 13, 2020, an intake meeting was conducted, and WRC employee Gabriela Yanez documented the discussion and her observations in a psycho-social assessment.

3 B. Claimant and Parent attended the intake meeting, and during that meeting, Claimant spoke in complete sentences with clear articulation. At times

Claimant mumbled his words, however once he was asked to focus, his speech was clear. (Exhibit 3.) Parent added that when he is not focused, Claimant will sometimes slur his words.

4. Parent shared that Claimant experienced fine motor difficulties in preschool with using scissors and holding a pencil. Claimant had difficulty regulating his body and sitting still. Teachers observed that Claimant showed a lack of empathy for other children when they got hurt.

5. Parents chose for Claimant to be held back in transitional kindergarten, he entered kindergarten at age six. In transitional kindergarten and kindergarten, Claimant displayed destructive and unruly behaviors that resulted in him being sent to the principal's office and being excluded from field trips unless accompanied by a parent.

6. In transitional kindergarten, Parent requested and was denied an individualized education program (IEP) for Claimant by his school district. (Exhibit 9.) Parent shared that Claimant received occupational therapy from a private therapist once per week for approximately five months during transitional kindergarten. The school district provided Claimant a 504 Plan in transitional kindergarten.

7. Claimant has difficulties with his interpersonal relationship with his sister, but he gets along well with his two other siblings. Claimant often argues with his sister and once retrieved a knife from the kitchen and told Parent that he would kill his sister with it. Parent reported Claimant continues to make threats against his sister. Parents believe Claimant's threats are credible. They have placed the kitchen knives out of his reach and require that an adult supervise him anytime he uses a knife.

8. At family gatherings, Claimant prefers to use a cellphone rather than socialize with others. Parent shared that Claimant prefers to talk only about topics of his interest, including electronics, guns and robberies, without regard for the other person's interest in the topic. Claimant will continue talking about these topics even after being told to stop. At the beginning of each school year, Claimant gets anxious if Parent doesn't accompany him inside the school. Claimant's anxiety has improved as a result of taking prescribed medication.

9. Claimant is in good health despite having a heart murmur when he was younger that resolved by itself. Claimant is prescribed medications to address his irritability, mood, and impulsivity. Claimant's vision and hearing are within normal limits, and he sleeps well and has a good appetite.

10. Claimant has no physical limitations and has full access to his surroundings. He can go up and down stairs with no difficulties and can hop, jump, and run without any concerns. Claimant displays age appropriate fine, gross, and visual-motor skills. Individual occupational therapy was not recommended. (Exhibit B3, p. 3 - Exhibit B4, p. 1.)

11. Parent shared that Claimant was delayed in potty training and had toileting accidents until he was five-and-a-half years old. Parent observed that Claimant lacks strength in his hands which makes it difficult for him to put on socks. Claimant gets distracted while performing self-care tasks. Claimant eats independently but refuses to eat certain colors of food. Parent complained that Claimant only helps with chores when asked to do so.

12 A. Claimant's uncle testified at hearing and shared that Claimant was a sweet and kind child but was disengaged in group settings and sometimes has

difficulty interpreting social cues when interacting with peers. Claimant's uncle observes him exhibit defiant behavior towards parents and elders.

12 B. Claimant participated in distance learning when his school was closed during the COVID-19 pandemic. Claimant's uncle tutored him during distance learning. During the tutoring sessions, Claimant needed help because he was below grade level proficiency in reading and writing. According to Claimant's uncle, Claimant was in the first grade and unable to write a sentence. Claimant's uncle believed Claimant should be able to write a sentence at this grade level. Claimant's uncle observed that Claimant did not complete homework assignments on time and completed them several weeks after they were due. Claimant's uncle observed Claimant get frustrated, upset and act out during tutoring sessions.

13 A. On May 10, 2019, Claimant's school district conducted a Psycho-Educational assessment to determine whether he was eligible for special education and related services. Claimant was six years, nine months old and in kindergarten at the time of the assessment. The Student Support and Progress Team at Claimant's school referred him for the evaluation due to his difficulty with academic performance and attention. At that time, Claimant had made little to no progress in school and was not meeting grade level standards. Claimant had difficulty staying focused on a task, difficulty completing work without adult assistance, and difficulty following class rules and interacting with peers. (Exhibit 9.)

13 B. The examiner assessed Claimant over three sessions and observed he was polite and responsive with the examiner who noted "rapport was easily developed." (Exhibit 9. p 6.) During the assessments, Claimant completed all tasks presented to him with good effort, but he had significant difficulty sustaining attention throughout the assessment and required frequent prompts to stay on task or to listen

when information was presented. The examiner observed that Claimant often rushed through tasks or responded impulsively, therefore some obtained scores may have underestimated his true abilities. (*Ibid.*)

13 C. The examiner estimated Claimant's cognitive ability to be within the low average range of functioning when compared to same-age peers. (Exhibit 9, p. 10.) To assess Claimant's cognitive abilities, the examiner administered the Cognitive Assessment Systems, 2nd Edition. Claimant scored in the well below average range on the Planning scale; low average range on the Simultaneous scale; low average range on the Attention scale; and Average range on the Successive scale. Claimant scored in the low average range on the Test of Auditory Processing Skills, 3rd Edition. Claimant's score on the Test of Visual Perceptual Skills(non-motor), 4th Edition suggested a low average visual processing speed.

13 D. Claimant's performance on standardized assessments to measure academic achievement showed his reading score was well below average, mathematics within the low average range, and written language in the well below average range. (Exhibit 9, p.12.)

13 E. The examiner referenced an occupational therapy (OT) assessment that was being completed concurrently with the psycho-educational evaluation. The OT report concluded that Claimant demonstrated adequate postural stability and body awareness for school functioning but presented with difficulties in his proprioceptive and vestibular systems. The OT examiner recommended classroom accommodations provided by the teacher and occupational therapy "to best meet [Claimant's] needs". (Exhibit 9, p. 12.)

13 F. The examiner noted that Claimant's social functioning with peers was not an area of concern for Parents or teacher. Claimant exhibited significant levels of inattention, hyperactivity, and impulsivity across multiple settings. Both Parent and teacher also reported Claimant exhibited more anxiety than most others his age and tended to have difficulty adjusting to changing situations. In the school environment, Claimant has difficulty in emotional regulation, learning and study skills, and communication skills. He is defiant and displays aggressive behaviors.

13 G. The examiner concluded that Claimant met the eligibility criteria as a student with a Specific Learning Disability and as a student with Other Health Impairment due to the Attention Deficit Hyperactivity Disorder-like characteristics. Claimant's IEP team developed a program that included resource services, adaptive physical education and according to Parent, "a minimal amount of occupational therapy."

14. After Claimant received the IEP, Parents took him to a therapist but Claimant refused to engage in therapy. Based on Claimant's refusal, the therapist recommended that Claimant undergo a neuropsychological evaluation in hopes of helping Claimant make progress in their therapy sessions. The therapist also recommended that Claimant see a psychiatrist to determine if medication would be beneficial.

15. Claimant's psychiatrist concluded that Claimant had a cognitive language learning disability and diagnosed him with significant Attention-Deficit/Hyperactivity Disorder (ADHD). (Exhibit A, p. 5.) The psychiatrist prescribed him medication to address the ADHD. Claimant became sluggish with flattened affect and experienced anxiety and moodiness when he took the medication.

16 A. Rita Eichenstein, Ph.D., conducted a neuropsychological and educational assessment in October and November 2019; Claimant was seven years, two months old. Dr. Eichenstein interviewed Claimant's parents, teacher, previous therapist, current treating pediatric neurologist, and psychiatrist, and she conducted a file review as part of the assessment. Dr. Eichenstein summarized Claimant's cognitive abilities by stating they "remain inconsistent, and this could be an underestimate of his actual abilities due to his level of disordered thinking and weak window of tolerance for addressing tasks that are outside of his self-preferred interests." Dr. Eichenstein obtained a valid IQ score of below the 10th percentile of cognitive abilities. (Exhibit A, pp. 13-14.)

16 B. Dr. Eichenstein observed Claimant showed a delay in both pre-reading and pre-writing skills and opined this could be consistent with dyslexia. The Wechsler Individual Achievement Test, Third Edition showed Claimant's early reading skills were significantly impaired (Standard Score = 63, 1st percentile.) (Exhibit A, p. 15.)

16 C. Dr. Eichenstein reported that Claimant demonstrated exceptionally powerful listening comprehension skills and his receptive vocabulary was exceptional. Dr. Eichenstein noted that Claimant had notable difficulty differentiating between fantasy and reality and although his listening comprehension was intact, it did not account for his reality orientation, which appeared to be at odds with what is typical. (Exhibit A, p. 20) Claimant's expressive language single word identification was intact. Claimant had a significant deficit in pragmatic language which highlighted more of a social communication disorder consistent with ASD than any actual speech delay. (*Ibid.*)

16 D. Claimant's adaptive functioning score showed he was less advanced than 87 percent of his peers. Dr. Eichenstein noted that all of Claimant's individual adaptive skills were below his age equivalent, with the most impact being his coping skills (age:

3.8) and his personal daily living skills (age: 4.6). Claimant's Communication Skills were in the low average range, (18th percentile rank); Daily Living Skills in the low average range (18th percentile rank); social skills and relationships in the adequate – low average range (25th percentile rank); and adaptive behavior composite in the low average range (18th percentile rank). (Exhibit A, p. 21.)

16 E. Dr. Eichenstein examined Claimant both with and without him taking his prescribed ADHD medication. Dr. Eichenstein observed that when taking the medication, Claimant showed a weak social understanding, was highly anxious and dependent, and had unrealistic and grandiose thinking, with flights of violent ideation/violent play themes. Claimant did not demonstrate the ability to stay within the present reality for very long and drifted back into his fantasy play world. Dr. Eichenstein opined Claimant's reality orientation was questionable. (Exhibit A, p. 25.)

16 F. Dr. Eichenstein made the following diagnoses: Autism Spectrum Disorder, High Functioning (Level 1-2); Attention-Deficit/Hyperactivity Disorder with Executive Dysfunction; Impulse Control Disorder (may be related to previously diagnosed ADHD but is increasing); Generalized Anxiety Disorder/Separation Anxiety; Global Delay with borderline (low average) intelligence with deficits in acquisition of learning, attention, self-regulation and social awareness. Dr. Eichenstein listed Claimant's learning disorders as dyslexia including reading and written expression, concept learning and Fine Motor Coordination Delay. Dr. Eichenstein noted other issues were oppositional behaviors and weak reality orientation. (Exhibit A, pp. 24-25.)

17 A. Claimant requested services from WRS and submitted to a psychological evaluation conducted by Naz Bagherzadeh, Psy.D. Dr. Bagherzadeh conducted the evaluation on April 2, June 17, November 12, and December 8, 2020. Due to the

COVID-19 pandemic, Dr. Bagherzadeh utilized various telehealth modalities to conduct the evaluation; Claimant was not assessed in-person.

17 B. Dr. Bagherzadeh examined Claimant's general intellectual ability and cognitive functioning using the Wechsler Preschool and Primary Scale of Intelligence-4th edition. Claimant did not complete the assessment and only responded to Similarities and Information Subtest questions of the Verbal Comprehension Index. As a result, a full-scale score was not yielded. Dr. Bagherzadeh reported Claimant's scores on the partially completed examination in the average range on both subtests. Dr. Bagherzadeh did not state whether the validity of the score was impacted by Claimant only partially completing the tests or whether Claimant used his best efforts to complete the evaluation.

17 C. To gather more information on Claimant's intellectual ability that minimized the impact of language skills, Dr. Bagherzadeh administered the Raven's-2 Progressive Matrices Clinical Edition. Dr. Bagherzadeh reported Claimant's score fell in the average range with a Standard Score of 92 and Age Equivalent of 6:10. (Exhibit 4, p. 18.) The report does not state on which date this examination was administered. Claimant was between seven years, eight months and eight years, four months old on the four dates he was evaluated. (Exhibit 4, p. 15.) Dr. Bagherzadeh did not describe how the age equivalent 6:10 and average range standard score related to Claimant's age.

17 D. Dr. Bagherzadeh relied on Dr. Eichenstein's examination results for adaptive behavior that showed Claimant scored in the moderately low range. (Exhibit 4, pp. 15-16, 19.) Dr. Bagherzadeh administered the Vineland Adaptive Behavior Scales, Third Edition, to assess Claimant's current adaptive functioning. Parent completed the scales and the scores were in the adequate range for Claimant's Daily Living Skills and

Socialization domains and moderately low range on the Communication and Motor Skills domains. Dr. Bagherzadeh pointed out Parent's responses were inconsistent for some items. Dr. Bagherzadeh opined that Parent's inconsistent responses resulted in overreporting of Claimant's social functioning and resulted in an overrepresented score for his current social functioning and understanding. Dr. Bagherzadeh did not explain whether the inconsistent responses affected her reliance on the data. (Exhibit 9, pp. 19-20.)

17 E. To assess for ASD and to learn more about Claimant's social functioning, Dr. Bagherzadeh asked him some questions from the Autism Diagnostic Observation Schedule, 2nd Edition. This examination permitted Dr. Bagherzadeh to observe and note behaviors that are identified as characteristic of ASD. Dr. Bagherzadeh also utilized the Childhood Autism Rating Scale, Second Edition (CARS2-HF). On the CARS2-HF assessment, Claimant received a raw score of 32, placing him in the mild-to-moderate severity group for ASD.

17 F. Dr. Bagherzadeh opined that Claimant meets the clinical diagnostic criteria for ASD and presented with qualitative impairments in reciprocal social communication and repetitive behaviors.

18. In its January 4, 2021 denial letter, WRC multidisciplinary team determined that Claimant was not eligible for regional center services. WRC stated that the reason for the decision was that Claimant was not substantially handicapped by intellectual disability, cerebral palsy, epilepsy, ASD or other conditions similar to intellectual disability. Although Claimant was given the diagnosis of ASD, the team did not see three or more areas of substantial disability. WRC recommended Claimant continue with ADHD supports.

19 A. Parents appealed the WRC's decision to deny Claimant regional center services. In response, WRC conducted a multidisciplinary observation session on February 2, 2021, to gather additional information about Claimant's eligibility for services. Mayra Mendez, Ph.D., L.M.F.T., led the multidisciplinary observation. Dr. Mendez is a licensed marriage family therapist and psychologist with a certification in early childhood development. Dr. Shilakes and Jessica Haro, WRC's board-certified behavior analyst and specialist in behavior and ASD, participated in the multidisciplinary observation.

19 B. The multidisciplinary observation was conducted remotely using the Zoom platform; Claimant was observed in his home with his mother present. At the beginning of the observation, Claimant problem solved connection issues the parties experienced. Claimant made suggestions on how the observation team should manipulate certain features of Zoom to access better reception and made accommodations on his end as well. Dr. Mendez observed that Claimant "used creative problem-solving skills and savvy to resolve connection challenges." Dr. Mendez opined this demonstrated his willingness to help manage and improve the situation as well as engaging in a collaborative process of problem solving. (Exhibit 6, p. 29.)

19 C. Dr. Mendez evaluated Claimant's functional ability in the area of learning and relied upon Dr. Bagherzadeh's psychological evaluation results that reported Claimant had average cognitive abilities. Dr. Mendez opined that Claimant demonstrated age appropriate cognitive skills and above average communication skills as seen in his expansive vocabulary skills and depth of details when describing experiences, functions, and actions. (Exhibit 6, p. 31.) Dr. Mendez noted that Claimant tells falsehoods and fabricates stories about experiences that are not real in his life.

19 D. Dr. Mendez evaluated Claimant's functional ability in the area of self-direction and noted Claimant was described as oppositional and inattentive at home and at school. Dr. Mendez did not observe negative behavior during the observation session. Dr. Mendez opined that Claimant displayed capacity for appropriate interactions with her during the observation as he responded to questions and remained attentive and focused for the duration of the consultation.

19 E. Dr. Mendez observed that Claimant presented with typical gross motor skills during the observation. Dr. Mendez opined there were no motoric concerns.

19 F. Dr. Mendez opined that Claimant's communication abilities were appropriate for his age. Claimant shared interest with the consultant and demonstrated appropriate reciprocity with conversational skills throughout the multidisciplinary observation. Dr. Mendez observed Claimant made appropriate eye contact and he communicated his thoughts, feelings, and needs adaptively. (Exhibit 6, p. 31.)

19 G. Dr. Mendez noted that Parent did not express concerns related to Claimant's self-care capacity during the multidisciplinary session. Claimant was reported to manage eating and clean-up responsibilities appropriately although Parent complained that Claimant does not typically help with chores and will demonstrate opposition, sometimes throw tantrums, when limits and expectations are imposed. (Exhibit 6, p. 32.)

19 H. Dr. Mendez opined that Claimant's capacity for independent living was not an area of need because Claimant was eight years, five months of age and it was appropriate that he lived with his parents.

19 I. Dr. Mendez opined that Claimant's economic self-sufficiency was not an area of need. Based on Claimant's age, it was appropriate for him to be economically dependent upon his caregivers.

20. At the fair hearing, WRC acknowledged that Claimant had been given the diagnosis of ASD by Dr. Bagherzadeh in February 2020. However, based on the multidisciplinary observation conducted in February 2021, the eligibility team did not believe that Claimant met all criteria of eligibility for regional center services. WRC also asserted that Claimant did not qualify for regional center services because he did not have a "substantial disability", which is defined as significant functional limitations, as appropriate to the age of the person, in three or more of the following areas of major life activity: receptive and expressive language; self-care; learning; mobility; self-direction; capacity for independent living and economic self-sufficiency.

21 A. To establish Claimant's lack of substantial disability, WRC offered the testimony of Kaley Shilakes, Ph.D., licensed clinical psychologist and intake manager for WRC. Dr. Shilakes is a member of the team that reviews applications and determines whether an applicant is eligible to receive regional center services. The eligibility team that considered Claimant's application consisted of Dr. Shilakes, psychologists, an autism behavior specialist, and a child neurologist.

21 B. By reviewing the records set forth above, Dr. Shilakes and the eligibility team assessed Claimant's functioning in the five relevant categories of major life activities. Based on Claimant's age, the team determined that he did not have a need in the following categories: capacity for independent living or economic self-sufficiency.

21 C. Dr. Shilakes opined that Claimant met the criteria of having a substantial disability in the area of self-direction. This conclusion was based on Claimant's difficulties in emotional development and social-interpersonal relationships. Dr. Shilakes noted that during the multidisciplinary observation, no negative demeanor or oppositional behavior was observed, but she acknowledged that Claimant could display these behaviors when not on Zoom. Dr. Shilakes and the eligibility team also considered the concerns raised by Parent in concluding that Claimant had a substantial disability in this area. The eligibility team determined no other areas of Claimant's major life activity were impacted by the ASD diagnoses besides self-direction.

21 D. Dr. Shilakes opined that Claimant did not have a substantial disability in the area of learning. Dr. Shilakes opined that Claimant functioned with age appropriate cognitive skills and contended that Parent's concern that Claimant was behind in academics was not necessarily related to a cognitive deficit. Dr. Shilakes opined Claimant's behavior of telling falsehoods was not an indication of a developmental disability and was not a characteristic of ASD. The fabrications and falsehoods were concerning but the team thought that Claimant should undergo a thorough mental health evaluation and explore therapy to address this behavior.

21 E. Dr. Shilakes opined that there was no concern related to Claimant's mobility and no motor skills problems were observed during the multidisciplinary observation.

21 F. Dr. Shilakes opined that there was no concern regarding Claimant's expressive and receptive language skills. Claimant's behavior during the multidisciplinary observations were age appropriate.

21 G. Dr. Shilakes opined that Claimant does not have a substantial disability in the area of self-care. Dr. Shilakes opined Claimant had the ability and capability to take care of himself but may have some oppositionality when asked to perform the task. Dr. Shilakes stated that Claimant's failure to perform a self-care related task is a result a self-direction issue rather than an ability issue.

21 H. Dr. Shilakes recommended that Claimant consider a comprehensive mental health assessment to explore behavioral concerns, fabrications, attention deficits, anger, and anxiety traits and to determine if mental health interventions may be beneficial. (Exhibit 7.)

22. After the multidisciplinary observation Dr. Shilakes and the eligibility team did not feel Claimant met all of the ASD criteria because he did not display behaviors usually associated with a developmental disability. Dr. Shilakes noted that during the observation Claimant demonstrated problem-solving ability, motivation, and collaboration. Claimant also shared his interests, maintained attention and engaged in reciprocal conversation and demonstrated age appropriate communication and cognitive skills. Dr. Shilakes opined that these strengths are not typically observed in children with ASD. (Exhibit 7.)

23. In its letter dated February 8, 2021, WRC determined that Claimant remained ineligible for regional center services after conducting the multidisciplinary observation.

24. The preponderance of the evidence established that Claimant has the developmental disability of ASD.

25. The preponderance of the evidence established that Claimant has significant functional limitations for a person his age in the area of self-direction.

LEGAL CONCLUSIONS

1. Claimant established that he suffers from a developmental disability (ASD) but he is not entitled to regional center services under the Lanterman Developmental Disability Services Act (Lanterman Act) because he does not have a substantial disability that creates functional limitations in three or more areas of major life activity. (Factual Findings 1-25, Legal Conclusions 2-11.)

2. Throughout the applicable statutes and regulations (Welf. & Inst. Code, §§ 4700- 4716, and Cal. Code Regs., tit. 17, §§ 50900 - 50964), the state level fair hearing is referred to as an appeal of the Service Agency's decision. A claimant seeking to establish eligibility for government benefits or services has the burden of proving by a preponderance of the evidence that he has met the criteria for eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 [retirement benefits]; Evid. Code, § 500.) Where a claimant seeks to establish eligibility for regional center services, the burden is on the appealing claimant to demonstrate by a preponderance of evidence that the Service Agency's decision is incorrect, and that the appealing claimant meets the eligibility criteria. Claimant has not met his burden of proof in this case.

3. In order to be eligible for regional center services, a claimant must have a qualifying developmental disability. As applicable to this case, Welfare and Institutions Code section 4512, subdivision (a), defines "developmental disability" as:

a disability that originates before an individual attains 18 years of age; continues, or can be expected to continue, indefinitely; and constitutes a substantial disability for that

individual. . . [T]his term shall include intellectual disability, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability, but shall not include other handicapping conditions that are solely physical in nature.

4 A. To prove the existence of a developmental disability within the meaning of Welfare and Institutions Code section 4512, a claimant must show that he has a "substantial disability." Pursuant to Welfare and Institutions Code section 4512, subdivision (1)(1):

"Substantial disability" means the existence of significant functional limitations in three or more of the following areas of major life activity, as determined by a regional center, and as appropriate to the age of the person:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

4 B. Additionally, California Code of Regulations, title 17, section 54001 states, in pertinent part:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

(A) Receptive and expressive language;

(B) Learning;

(C) Self-care;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency.

5 A. In addition to proving a "substantial disability," a claimant must show that his disability fits into one of the five categories of eligibility set forth in Welfare

and Institutions Code section 4512. The first four categories are specified as: intellectual disability, cerebral palsy, epilepsy, and autism. The fifth and last category of eligibility is listed as "disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with intellectual disability." (Welf. & Inst. Code, § 4512.)

5 B Whereas the first four categories of eligibility are very specific, the disabling conditions under this residual fifth category are intentionally broad to encompass unspecified conditions and disorders. However, this broad language is not intended to be a catchall, requiring unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average functioning and impaired adaptive behavior; under the Lanterman Act, the Service Agency does not have a duty to serve all of them.

5 C. The Legislature requires that the fifth category qualifying condition be "closely related" to intellectual disability or "require treatment similar to that required" for individuals with intellectual disability. (Welf. & Inst. Code, § 4512). The definitive characteristics of intellectual disability include a significant degree of cognitive and adaptive deficits. Thus, to be "closely related" to intellectual disability, there must be a manifestation of cognitive and/or adaptive deficits which render that individual's disability like that of a person with intellectual disability. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to intellectual disability. If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant's cognitive and adaptive functioning and a determination of whether the effect on his performance renders him like a person with intellectual disability. Furthermore, determining whether a claimant's condition "requires

treatment similar to that required” for persons with intellectual disability is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training, living skills training, speech therapy, or occupational therapy). The criterion is not whether someone would benefit. Rather, it is whether someone’s condition requires such services.

6. Furthermore, in order to establish eligibility, a claimant’s substantial disability must not be solely caused by an excluded condition. The statutory and regulatory definitions of “developmental disability” (Welf. & Inst. Code, § 4512 and Cal. Code. Regs., tit. 17, § 54000) exclude conditions that are solely physical in nature. California Code of Regulations, title 17, section 54000, also excludes conditions that are solely psychiatric disorders or solely learning disabilities. Therefore, a person with a “dual diagnosis,” that is, a developmental disability coupled either with a psychiatric disorder, a physical disorder, or a learning disability could still be eligible for services. However, someone whose conditions originate only from the excluded categories (psychiatric disorder, physical disorder, or learning disability, alone or in some combination) and who does not have a developmental disability would not be eligible.

7. The Lanterman Act and its implementing regulations contain no definition of the qualifying developmental disability of “autism.” Consequently, when determining eligibility for services on the basis of autism, that qualifying disability has been defined as congruent to the DSM-5 definition of “Autism Spectrum Disorder.”

8. The DSM-5, section 299.00 discusses the diagnostic criteria which must be met to provide a specific diagnosis of ASD, as follows:

A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Deficits in social-emotional reciprocity, ranging, for example from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.

2. Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.

3. Deficits in developing, maintaining, and understanding relationships, ranging, for example from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.

B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):

1. Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).

2. Insistence on sameness, inflexible adherence to routines, or ritualized patterns of verbal or nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat same food every day).

3. Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interests).

4. Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching objects, visual fascination with lights or movement).

C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities or may be masked by learned strategies in later life).

D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.

E. These disturbances are not better explained by intellectual disability (intellectual development disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

(DSM-5, at pp. 50-51.)

9. As determined by Dr. Bagherzadeh and Dr. Eichenstein, Claimant meets the criteria under the DSM-5 for a diagnosis of ASD.

10. The preponderance of the evidence did not establish that Claimant has significant functional limitations for a person his age in at least three of the seven areas of major life activity as defined by Welfare and Institutions Code section 4512, subdivision (1)(1), and California Code of Regulations, title 17, section 54001. Claimant established that he has a significant functional limitation in one area: self-direction.

11. Claimant is not eligible to receive regional center services.

///

///

ORDER

Claimant's appeal is denied. Claimant is not eligible to receive regional center services from the Westside Regional Center.

DATE:

MARLO NISPEROS

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.